# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 12, 2006 |
| v | No. 262201<br>Wayne Circuit Court |
| DONALD LEE ADAMS,<br><br>Defendant-Appellant. | LC No. 03-006497-01 |

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of larceny involving more than $1000 but less than $20,000, MCL 750.356(3)(a). Defendant was sentenced to six months in jail with work release and sixty months' probation. Defendant was also ordered to pay $76,000 in restitution. Defendant's sole issue on appeal is his argument that his attorney rendered ineffective assistance of counsel. We affirm.

Defendant's conviction arose from an incident that occurred on February 11, 2003, at the Ford Motor Company Parts Distribution Center in Brownstown Township, Michigan. On that date, a small, white, panel truck, driven by Richard Keys, entered Ford Motor Company's property and pulled up to a truck well. Earlier that day, Keys received a call from a cellular telephone registered to defendant and was instructed to drive to the location and retrieve a load of automobile parts. Upon arrival at the truck well, two pallets of glow plugs, valued at $228,000, were loaded onto Keys's panel truck, allegedly by defendant and another employee, Andre Walker, without the knowledge or authorization of Ford Motor Company. Keys drove the parts to 14523 Washburn Street, Detroit, Michigan, where the pallets were unloaded; this address was the address of defendant's cousin.

Before this incident, Ford Motor Company had experienced a history of significant financial losses through the theft of automobile parts at this location. Ford Motor Company had been investigating the thefts and identified several potential suspects involved in the unauthorized removal of automobile parts from the Brownstown Township site. These suspects included defendant, his coworkers Andre Walker and Eugene Lott, and another employee who is the son of defendant's counsel, Robert McClinton, Jr. The son of defendant's counsel was, ultimately, never arrested or charged with the theft that occurred on February 11, 2003. Walker and Keys were arrested and entered into plea agreements, which included their obligation to provide testimony at defendant's trial.

On February 10, 2003, an attempt to steal the glow plugs was initiated but aborted. However, on February 11, 2003, Keys was contacted and told to proceed to the Brownstown Township location for a pick up. After parking his panel truck at the loading wells, two pallets of glow plugs were quickly loaded onto his truck. Although defendant denied any complicity in this theft, another employee, Kandi McCarty, observed defendant driving a "hi-lo" and placing a pallet in the suspect truck. McCarty also saw Andre Walker load the second pallet onto the truck. Walker admitted to participating in the theft of the parts by loading one of the pallets onto Keys's truck and indicated that defendant was present during the events on the loading dock, having observed defendant on a "hi-lo" with the "mask of his truck" inside Keys's vehicle. Although telephone calls instructing Keys to the pick-up location were traced through telephone records to defendant's cellular telephone, Keys could not identify the voice providing him with instructions as belonging to defendant. Keys and Walker both pleaded guilty before defendant's trial to the larceny that occurred on February 11, 2003, and, as part of their agreement with the prosecutor, provided testimony at defendant's trial.

Defendant raises the issue of ineffective assistance of counsel. The allegations are two-fold, comprising both a more traditional complaint regarding the performance of counsel during trial as well as a more unique factual situation pertaining to a conflict of interest that does not arise from the typical concerns involving an attorney's joint representation of multiple defendants in a criminal case. See *People v Gallagher*, 116 Mich App 283, 292-293; 323 NW2d 366 (1982). Defendant's claim that a conflict of interest existed involves an assertion that defendant's trial counsel was protecting his son, Robert McClinton, Jr., who was not a defendant in the instant case but was under investigation for his complicity in the ongoing theft of automobile parts from the distribution facility. The relevant inquiry with regard to this claim is whether defendant received the "undivided loyalty" of his attorney. *Id.*

A determination that a defendant has been deprived of the effective assistance of counsel is a mixed question of constitutional law and fact. *People v Matuszak,* 263 Mich App 42, 48; 687 NW2d 342 (2004). A trial court's factual findings are reviewed for clear error, and its constitutional rulings are reviewed de novo. *Id.* To demonstrate ineffective assistance of counsel, it must be shown that an attorney's performance fell below an objective standard of reasonableness and that the deficient representation so prejudiced the defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); see also *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

The Sixth Amendment of the United States Constitution guarantees a defendant the right to counsel. This right encompasses the right to have an attorney that is not "burdened by an actual conflict of interest." *Strickland, supra*, p 692. When a claim of ineffective assistance of counsel involves an assertion of the existence of a conflict of interest, a defendant must demonstrate that an actual conflict of interest negatively impacted his attorney's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Hence, a defendant is charged with the burden of proving "that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Id.* at 557, quoting *Cuyler v Sullivan*, 446 US 335, 348-350; 110 S Ct 1708; 64 L Ed 2d 333 (1980). The existence of an actual conflict of interest that adversely impacts the sufficiency of an attorney's performance is presumptively prejudicial. *Smith, supra,* pp 556-557.

The analysis process is two-fold. First, of course, it must be determined whether a conflict of interest existed. If a conflict of interest is established, the next inquiry is whether the conflict adversely impacted counsel's performance. *Id.*, p 556. To demonstrate that a conflict of interest did adversely affect an attorney's performance requires a showing "that some effect on counsel's handling of particular aspects of the trial was 'likely.'" *United States v Christakis*, 238 F3d 1164, 1170 (CA 9, 2001) (citations omitted); *People v Lafay*, 182 Mich App 528, 530; 452 NW2d 852 (1990). It is incumbent upon a defendant to show that an alternative, plausible defense strategy could have been pursued and that the alternative strategy was, in some manner, inherently in conflict with or not followed because of counsel's divided loyalties. *Perillo v Johnson*, 79 F3d 441, 448-450 (CA 5, 1996); *United States v Malpiedi*, 62 F3d 465, 469 (CA 2, 1995). Pursuant to this evaluation standard, a defendant need not show that the defense or foregone tactic would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative. *Malpiedi*, *supra*, p 469; see also *Gallagher*, *supra*, pp 293-294.

Defendant does not claim that he was unaware of the relationship between his counsel and counsel's son, or the involvement of counsel's son in the ongoing investigation by Ford Motor Company into the theft of automobile parts from the Brownstown Township facility. Defendant acknowledged that counsel's son contacted him, after a meeting at Ford Motor Company involving defendant, McClinton, and his son, suggesting defendant retain his father for his legal representation. Defendant retained McClinton knowing his relationship to another employee being investigated regarding the ongoing thefts. Moreover, defendant ignores the fact that McClinton's son was never charged in the theft of the glow plugs, which comprised the basis for defendant's arrest. Purportedly, McClinton's son was not at the facility on February 11, 2003, and none of the testimony provided regarding the events on that date involved any implication that the son of defendant's counsel was specifically involved in that larceny.

Nevertheless, defendant contends that his attorney purposefully and intentionally avoided the questioning of witnesses and the elicitation of testimony that would implicate his son in an attempt to deflect suspicion from his son. In support of this contention, defendant focuses on the following testimony by Keys:

> A while back I had a delivery. I had been going – I have deliveries to that plant a lot. Ran into a guy named Rob. That's who actually got me started. But I ran into Rob. He asked me how often did I come here. I said I come about three to four times a week, you know, depending. He asked me –

At this point, defendant's counsel lodged a hearsay objection. The prosecutor directed Keys to continue, but without stating "what he said." The testimony proceeded uninterrupted and without further relevant objection by defendant's counsel. Defendant contends that "Rob" referred to defense counsel's son and that defense counsel improperly interrupted this line of questioning in an attempt to deflect suspicion from his son. However, defendant ignores that the full name of counsel's son was included in the testimony of various witnesses, throughout the proceedings, without any objection or interference by defendant's counsel.

While defendant's counsel arguably exercised questionable judgment in electing to provide legal representation to defendant, with the knowledge that his own son was implicated in an ongoing, peripheral investigation, McClinton's conduct simply did not demonstrate the

existence of an "actual conflict." MRPC 1.7(b) precludes an attorney from representing a client "if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." However, a lawyer may engage in the representation if he "reasonably believes the representation will not be adversely affected" and "the client consents after consultation." MRPC 1.7(b)(1) and (b)(2). Because McClinton's son was not charged in the same offense, defendant's assertion that his counsel's performance was geared toward protecting his own progeny from further investigation, rather than focused on defendant's representation, is merely speculative. Defendant fails to demonstrate that McClinton was involved in the provision of any legal representation on behalf of his son, concurrent with his representation of defendant. A conflict of interest is never presumed or implied. *People v Lafay, supra,* p 530. "To warrant reversal, the prejudice shown must be actual, not merely speculative." *People v Fowlkes,* 130 Mich App 828, 836; 345 NW2d 629 (1983). Because defendant fails to identify any evidence indicating that McClinton actively lessened his defense as a result of his son's involvement in a commensurate investigation regarding similar charges and events, defendant fails to establish ineffective assistance of counsel based on a conflict of interest.[1]

Defendant further contends that his attorney's performance fell below an objective standard of reasonableness and that defendant was so prejudiced that he was denied a fair trial, because there exists a reasonable probability that, but for his attorney's errors, the result of the proceedings would have been different. *People v Moorer,* 262 Mich App 64, 75-76; 683 NW2d 736 (2004). Specifically, defendant asserts that his counsel erred in permitting records to be admitted, pertaining to the shipment of glow plugs to Ford Motor Company, without proper authentication. Defendant also asserts that his attorney erred in advising him to refrain from testifying based on the admissibility of his prior record. Defendant argues that he wanted to testify regarding his version of the events and to explain that his ownership of the cellular telephone did not entail possession and use of the instrument.

To establish that he was deprived of the effective assistance of counsel, defendant must demonstrate that his attorney's performance was so deficient and the errors committed so serious that the attorney was not functioning in accordance with the counsel guaranteed by the Sixth Amendment. *People v LaVearn,* 448 Mich 207, 213; 528 NW2d 721 (1995). Defendant must show that his attorney's deficient performance so prejudiced his defense that he was denied a fair trial. *Id.* To achieve this, defendant must overcome the presumption that his counsel's actions and choices could have comprised sound trial strategy. *Id.*, p 216. Defendant must demonstrate that there exists a reasonable probability that, but for the errors of his counsel, the result of the proceedings would have been different. *Id.* This evaluation is required to be performed without the benefit of hindsight. *People v LaVearn,* 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant contends that McClinton erred in failing to object to the admission of shipping records pertaining to the stolen glow plugs. Defendant argues that the records were not admissible because they were not authenticated by a records custodian at the originating source.

[1] Nor does defendant identify any pertinent evidence indicating that McClinton lessened his defense as a result of his having represented Andre Walker during Walker's arraignment.

We note, however, that a claim of ineffective assistance of counsel cannot be based on a failure to make a meritless motion. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003). Arguably, the records challenged by defendant were admissible in accordance with MRE 803(6) as records of regularly conducted activity. Further, the trial court indicated that, even if an objection had been lodged, the court would have allowed the prosecutor time to produce an additional witness to authenticate the documents, leading to their eventual admission into evidence. Defendant has simply failed to demonstrate that his attorney's action with regard to the records was objectively unreasonable or affected the outcome of the trial.

Defendant asserts that McClinton improperly advised him not to testify at trial. Defendant indicates that he would have testified that he only "bumped" the pallet, contrary to the testimony of two witnesses indicating that defendant actually deposited one of the pallets of stolen parts onto Keys's truck. Defendant also contends that he wanted to testify to explain that the cellular telephone, which implicated his involvement, was not in his possession or use on the day of the events alleged. Defendant argues that the failure of McClinton to permit him to testify was based on McClinton's fear that defendant would implicate his son in the ongoing thefts and prolong or continue the investigation. Defendant further asserts that McClinton improperly advised him that his prior convictions, of a drug delivery charge in 1990 and a subsequent conviction of operation of a motor vehicle under the influence, could be used against him should he take the stand.

During the post-conviction proceedings, the trial court noted that at no point during the proceedings did defendant indicate to the trial court his desire to testify, dissatisfaction with his counsel's performance, or his attempt to secure alternative counsel before trial. McClinton indicated that defendant concurred in not testifying based on his advice that admitting he had provided a telephone used to arrange the thefts to another individual could result in an inference that he was involved. McClinton's primary defense was the failure of the prosecutor to prove that the alleged stolen parts had actually ever been delivered to Ford Motor Company in the first place and his argument that the truck that was to have held the parts had been retained in a holding area, unattended, for several days and then left in the dock well, with the seal broken, for a day before being unloaded, affording anyone the opportunity to remove contents from the vehicle. McClinton acknowledged discussing defendant's prior convictions with him, but denied instructing defendant that the convictions would be admissible at trial, asserting that his decision to not place defendant on the witness stand was based on another consideration. McClinton opined that defendant's assertion, despite owning the cellular telephone used to effectuate the larceny, that he was not involved in the transaction or use of the phone would be "highly suspect" to the jury.

A defendant's decision to testify is deemed a strategic decision that is best left to defendant and his attorney. *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). Defendant has failed to present any evidence that he ever expressed a desire to testify during trial. There is no indication in the lower court record that defendant was prevented from testifying by either his attorney or the trial court. If a defendant decides not to testify or acquiesces to his attorney's determination regarding testifying, the right to testify is deemed to be waived. *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985).

Defendant has not demonstrated how his alleged testimony would have provided a substantial defense or have made a difference in the outcome of the trial. His assertion that his

only involvement was in "bumping" the pallet was brought out in the examination of another witness. Moreover, in advising defendant to refrain from testifying, trial counsel may have sought to downplay defendant's ownership of the telephone used to arrange the larcenies and may have wished to avoid raising a credibility issue regarding defendant. In addition, McClinton elicited an acknowledgment from Keys that he could not identify defendant as the voice on the telephone when arranging for pick up of the automobile parts. Under the circumstances, defendant has failed to demonstrate that he was deprived of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant additionally contends that counsel was ineffective for eliciting a response from Ford Motor Company security employee Harvey White that inventory losses were dramatically reduced following the resolution of the incident of February 11. Defendant asserts that this testimony was damaging because it implied a reduction in thefts following defendant's arrest. McClinton explained that his reason for asking this question was based on information he had been provided by defendant that thefts remained a substantial issue at the plant; this coincided with his strategy to demonstrate that the prosecutor could not specifically link defendant to the theft incident and to emphasize that other individuals were under investigation for the thefts. It is recognized that what questions to ask a witness are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We find no ineffective assistance of counsel with regard to the questioning of White.

Defendant also argues that his attorney rendered ineffective assistance of counsel in failing to object to allegedly inadmissible hearsay testimony provided by Daniel Belinc, Robert Grant, and White. We disagree. The testimony in question by Grant was not offered for the truth of the matter asserted but rather was offered to indicate how Grant learned about the case. The testimony by White regarding the information he obtained from a confidential informant was similarly offered to explain how White became involved in the investigation and was not offered for the truth of the matter asserted. Under the circumstances, therefore, defense counsel did not act unreasonably in failing to object to the testimony in question by Grant and White. See MRE 801(c) (defining "hearsay"). Moreover, the testimony by Belinc that he "confirmed with the supplier to make sure" that the missing parts were supposed to be on a particular truck was cumulative to his testimony that "according to the packing slip the parts were" supposed to be on the truck. Accordingly, we conclude that the failure by defense counsel to object to Belinc's testimony did not affect the outcome of the trial. *LaVearn, supra,* p 216. With regard to the alleged hearsay testimony by White concerning the fact that no parts had "come up missing" lately, we conclude that this testimony, in light of all the other evidence introduced at trial, could not reasonably have affected the outcome of the trial. Moreover, as discussed in the prior paragraph, defense counsel had a strategic reason for questioning White about recent losses. Accordingly, defendant has not established ineffective assistance of counsel by virtue of defense counsel's failure to keep this testimony out of the trial. *Rockey, supra,* p 76; *LaVearn, supra,* p 216.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Pat M. Donofrio